Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

DUSTA LJUCOVIC,
Petitioner,

v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

* Marshal E. Hyman
Russell R. Abrutyn
MARSHAL E. HYMAN
& ASSOCIATES, PC
3250 West Big Beaver
Suite 529
Troy, MI 48084

248-643-0642
Fax 643-0798

* *Counsel of Record*
Counsel for Petitioner

March, 2006

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit and Board of Immigration Appeals erred as a matter of law and deprived an asylum applicant of due process by refusing to reopen her deportation proceedings when her attorney's failure to notify her of the Board of Immigration Appeals decision denying her appeal deprived her of the opportunity to seek judicial review or timely comply with the decision.

2. Whether an alien's right to petition for asylum includes the right to have judicial review over the denial of her application.

3. Whether the Court should resolve a split among the circuit courts of appeals regarding the presumption that an alien is prejudiced when her attorney's ineffective assistance deprives her of the ability to seek judicial review.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dusta Ljucovic respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on August 8, 2005 and December 30, 2005, respectively.

OPINIONS BELOW

The opinion of the Immigration Judge (App. E hereto) is unreported. The opinions of the Board of Immigration Appeals (App. C and D hereto) are unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. B hereto), of which review is sought, is unreported. The order of the Sixth Circuit denying the petition for panel rehearing and suggestion for rehearing en banc in such case (App. A hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. B) was entered on August 8, 2005. The court denied Petitioner's timely petition for rehearing on December 30, 2005 (App. A). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of

appeal on the same important matter and has sanctioned a decision of the Board of Immigration Appeals that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 U.S.C. § 1158(a)(1) provides:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1182(a)(9)(B)(iii)(II) provides:

> No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken

into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

8 U.S.C. § 1252 provides, in relevant part:

(a)(2)(B) Denials of discretionary relief:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review …

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than

the granting of relief under section 1158(a) of this title...

(b)(4)(D) The Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA") and the Sixth Circuit Court of Appeals concluding that an asylum applicant was not prejudiced when her attorney's failure to notify her that the BIA denied her appeal deprived her of the ability to seek judicial review or timely comply with the deportation order. The Immigration and Nationality Act, implementing regulations, international human rights law, and longstanding federal and agency precedent steadfastly protect the right of asylum applicants to have their claims heard.

(ii) Proceedings at the Immigration Court

Ms. Dusta Ljucovic, a 38-year-old native and citizen of Yugoslavia, entered the United States on November 1, 1990. On August 22, 1996, she filed a timely application for asylum with the Immigration and Naturalization Service ("INS").[1]

On February 5, 1997, the INS referred her application to the Immigration Court and alleged that she was deportable as an alien who entered the United States without inspection, in violation of 8 U.S.C. § 1251(a)(1)(B) (1995).

Sitting in Detroit, Michigan, the Immigration Judge ("IJ") concluded that Mr. Ljucovic was credible and had a subjective fear of returning to Serbia and Montenegro. Nevertheless, the IJ found that Ms. Ljucovic lacked an objectively reasonable fear of persecution and, therefore,

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

denied her applications and ordered her removed to Serbia and Montenegro. (App. E).

(iii) Proceedings at the Board of Immigration Appeals

Ms. Ljucovic timely appealed to the BIA. On July 1, 2002, the BIA affirmed without opinion the IJ's decision. App. D1. Her attorney at the time, Richard Kulics, failed to notify her of the BIA's decision. It was not until May 2003 that Ms. Ljucovic learned that the BIA denied her asylum application and ordered her deported.

On June 19, 2003, Ms. Ljucovic filed a motion to reopen with the BIA alleging that because Mr. Kulics failed to notify her of the BIA's decision, she lost her right to seek judicial review or timely comply with the decision. On November 18, 2003, the BIA denied the motion, finding it untimely and concluding that Ms. Ljucovic did not adequately explain how her previous attorney's assistance was ineffective or how it prejudiced her. (App. C).

Ms. Ljucovic timely petitioned for review from the second BIA decision.

(iv) Statement of Facts

Ms. Ljucovic is a 38-year-old native and citizen of Yugoslavia who was born in Titograd, Montenegro. Her

ethnicity, Albanian, and religion, Catholicism, both make her a minority in the ethnically divided former Yugoslavia.

She stopped going to school when she was 10 years old because she had to help her mother do housework and raise her three brothers and two sisters. When she was 22, Mr. Pasko Ljucovic asked her father for permission to marry her. Ms. Ljucovic had never met Pasko and did not want to marry him. Telling her she had no choice, Ms. Ljucovic's father arranged the marriage with his business associate, Pasko's uncle. One month later, on August 20, 1990, she and Pasko wed.

After marrying at the local city hall, she moved into Pasko's house. Two to three weeks later, Pasko began beating her and would not let her leave their house. Although the local custom allowed a new wife to visit her family three weeks after the wedding, Pasko beat her when she asked to see her family.

At a post-wedding celebration at her parents' house, she told her mother about the abuse and that she wanted to leave. Her mother told her that she had to stay with Pasko.

Pasko beat her when they returned home from the celebration. When her family refused to help, Ms. Ljucovic reported the abuse to the police. The police officers

laughed at her and told her, sarcastically, that they would help her. Their idea of help was to call Pasko so he could take her home. Pasko took her home and beat her again.

Turned down by her family and the police, Ms. Ljucovic found someone who could arrange for her to receive a visa so she could leave the country. She came to the United States because her brother lived here and he was the only family member willing to help her. To get to the United States, she traveled with a tour group through Germany and Mexico.

After she left, Pasko divorced her. They were married a total of four months. She cannot return to Serbia and Montenegro because her family will not accept her. They have refused to have any contact with her after she left Pasko.

As a member of a persecuted minority group, shunned by her family, and beyond marriageable age, she has nowhere to turn to in Serbia and Montenegro for protection. The United Nations High Commissioner for Refugees and the United States Department of State criticized the institutionalized violence against religious minorities, ethnic minorities, and women in the former Yugoslavia. Violence against women increased with the

suppression of rights for ethnic minorities and the rise of nationalism.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction in the Sixth Circuit Court of Appeals was proper. 8 U.S.C. § 1252(a)(2)(B). Venue was proper in the Sixth Circuit because an IJ sitting in Detroit, Michigan completed the Immigration Court proceedings. 8 U.S.C. § 1252(b)(2).

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the BIA that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. Petitioner was Prejudiced Because her Previous Attorney's Ineffective Assistance Deprived her of an Opportunity to be Heard on her Asylum Application

As an asylum applicant, Ms. Ljucovic was entitled to judicial review of the administrative denial of her applications for asylum and withholding of removal. Mr. Kulics' ineffective assistance of counsel deprived her of this review. His inexcusable failure to notify her of the BIA's decision unquestionably prejudiced her in that it deprived her of her right to judicial review of her asylum application and resulted in her being subject to criminal and civil penalties and a ten year bar on admission resulting from her failure to comply with the BIA's order.

A. Petitioner Complied with the Statutory Requirements for Making an Ineffective Assistance of Counsel Claim

The BIA acknowledged that Ms. Ljucovic complied with at least two of the three the procedural requirements for making an ineffective assistance of counsel claim. (App. C); Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA 1988). She filed a Request for Investigation with the State Bar of Michigan against Mr. Kulics, notified him of the

allegations, and provided him with an opportunity to respond.

The BIA and the Sixth Circuit believed that her affidavit did not sufficiently detail her agreement with Mr. Kulics, including how she was to be notified of the BIA's decision. The lack of an explicit agreement concerning notification does not mean that Mr. Kulics did not have an obligation to keep her apprised of any important developments. The BIA and Sixth Circuit should not rigidly or arbitrarily apply the Lozada requirements where the record clearly identifies the ineffective assistance. See Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002).

Ms. Ljucovic reasonably assumed that Mr. Kulics would attempt to contact her by any reasonable means, such as mail or telephone. This assumption proved to be valid because Mr. Kulics did try to mail the decision to Ms. Ljucovic but, unfortunately, used the wrong zip code. Ms. Ljucovic did all that she could to stay informed about the status of her case when she provided Mr. Kulics with her new address. It was beyond her knowledge and control when Mr. Kulics sent notice to the wrong zip code.

As the attorney, it was Mr. Kulics' responsibility to create a written agreement defining the scope of his

representation. His failure to do so does not mean that Ms. Ljucovic waived her right to be notified about the BIA's decision. Rather, it meant that Mr. Kulics' performance and duties were governed by the "default" rules of professional conduct. He has a duty to "act with reasonable diligence and promptness in representing a client." MRPC 1.3 (emphasis in original). This requires him to "keep a client informed about the status of a matter and promptly comply with reasonable requests for information" and to "notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains." MRPC 1.4(a). "A lawyer shall provide competent representation to a client." MRPC 1.1.

The BIA's regulations assume that an attorney will keep a client informed because the agency does not directly serve a represented alien with any notices or decisions. 8 C.F.R. § 1292.5(a). Thus, the only way that Ms. Ljucovic would learn of a decision was if Mr. Kulics told her.

The Sixth Circuit and BIA previously criticized Mr. Kulics because he "could have taken greater care and diligence in the preparation and presentation" of an immigration case. Allabani v. Gonzales, 402 F.3d 668, 677-78 (6th Cir. 2005) (quoting from the BIA's decision).

In that case, Mr. Kulics failed to file a brief with the BIA or submit supporting evidence. Id.

B. Petitioner Received Ineffective Assistance of Counsel

Mr. Kulics failure to notify Ms. Ljucovic of the BIA's decision, depriving her to the ability seek judicial review and resulting in her becoming inadmissible to the United States for ten years, undoubtedly falls below the minimum level of performance expected of attorneys in immigration proceedings.

Ms. Ljucovic reasonably expected, and deserved, more from Mr. Kulics. The Michigan Rules of Professional Conduct require a lawyer to provide "competent" representation and "act with reasonable diligence and promptness." MRPC 1.1, 1.3 (emphasis in original).

C. Petitioner has a Due Process Right to Effective Assistance of Counsel

> "Although a deportation proceeding is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

U.S. ex. rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975).

Aliens present in the United States, even those "whose presence ... is unlawful, involuntary, or transitory," are protected by the Fifth Amendment due process clause. Mathews v. Diaz, 426 U.S. 67, 77, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976). The BIA and at least seven federal circuits have recognized "that despite having no right to appointed counsel in an immigration hearing, a respondent has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents respondent from meaningfully presenting his or her case." Matter of Assaad, 23 I. & N. Dec. 553, 558 (BIA 2003); see also Dakane v. Attorney General, 371 F.3d 771, 774-75 (11th Cir. 2004); Singh v. Ashcroft, 367 F.3d 1182, 1186 (9th Cir. 2004); Betouche v. Ashcroft, 357 F.3d 147, 149 (1st Cir. 2004); Denko v. INS, 351 F.3d 717, 723-24 (6th Cir. 2003); Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002); Iavorski v. INS, 232 F.3d 124, 128-29 (2d Cir. 2000); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990).

Ineffective assistance of counsel deprives asylum applicants of the very procedural safeguards intended to protect bona fide refugees from future persecution. An asylum hearing should involve a "cooperative," not

adversarial, approach. Matter of S-M-J-, 21 I. & N. Dec. 722, 724 (BIA 1997). American and international asylum law imposes upon the BIA a duty "to assist in clarifying and bringing out evidence in support of an asylum seeker's claim." Qiu v. Ashcroft, 329 F.3d 140, 156 n.17 (2d Cir. 2003) *quoting* Matter of A-S, 21 I. & N. Dec. 1106, 1127 (BIA 1998); see also Shoafera v. INS, 228 F.3d 1070, 1075 (9th Cir. 2000).

The Fifth Amendment due process protection against ineffective assistance of counsel ensures that an asylum applicant receives a full and fair adjudication of her claim. "Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level." Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) (criticizing repeated failure to deliver "reasoned judgments at the administrative level"). The BIA has time and again demonstrated its inability to use its statutory and regulatory authority to clarify and bring out the evidence in support of an asylum claim.

The Seventh Circuit estimated that in the year ending September 23, 2005, it reversed, in whole or in part, 40 percent of the BIA decisions that it reviewed on the merits. In comparison, it reversed only about 18 percent of

other civil cases in which the United States was the appellee. Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). The high reversal rate is because "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice ... All that is clear is that it cannot be in the interests of ... the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security ... and the Department of Justice." Id. at 830. Asylum applicants need effective assistance of counsel to help them present their claim and respond to any administrative errors.

D. The Ineffective Assistance of Counsel Prejudiced Petitioner by Depriving her of Review of her Asylum Claim

In deciding that there is no prejudice here to Petitioner, the executive agency misinterpreted it role. Had the BIA granted Ms. Ljucovic's motion to reopen for the purpose of reissuing its July 1, 2002 decision, she could have timely petitioned for review to the Sixth Circuit or left the United States. Any alien physically present in the United States, regardless of status, is entitled to apply for asylum. 8 U.S.C. § 1158(a)(1). Aliens are entitled to a

hearing on their asylum applications and appellate review. 8 C.F.R. §§ 1208.30(f), 1003.6(a). Asylum applicants are not "unlawfully present" unless they work without authorization. 8 U.S.C. § 1182(a)(9)(B)(iii)(II).

The BIA must "ensure that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim." S-M-J-, 21 I. & N. Dec. at 723. Judicial review is an important, and statutorily protected, safeguard of the rights of asylum seekers:

> Asylum petitions of aliens seeking refuge from alleged persecution are among the hardest cases faced by our courts. They are not games. And, despite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention--by immigration judges, in the first instance, and by federal judges, on appeal--to which all litigants are entitled. We should ~~not~~ forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application ... we risk condemning an individual to persecution.

> Whether the danger is of religious discrimination, extrajudicial punishment, forced abortion or involuntary sterilization, physical torture or banishment, we must always remember the toll that is paid if and when we err.

Xue v. BIA, __ F.3d __, 2006 WL 391705 *1 (2d Cir. 2006) (internal footnotes and citations omitted).

Although Congress sought to greatly circumscribe the ability of the federal courts to review other discretionary decisions, Congress specifically protected the ability of the federal courts to review asylum determinations, including discretionary denials. 8 U.S.C. §§ 1252(a)(2)(B)(ii), (b)(4)(D). Furthermore, unlike asylum, the related relief of withholding of removal is mandatory. 8 U.S.C. § 1231(b)(3)(A).

The right to judicial review is not a meaningless formality. The Seventh Circuit reversed, in whole or in part, 40 percent of the petitions for review it received challenging the BIA decisions it reviewed on the merits. Benslimane, 430 F.3d at 829. The "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." Id. at 830.

It "is not surprising that the position of overburdened immigration judges and overworked courts has become a matter of wide concern." Xue, *supra*, at *1.

Asylum applicants have the "constitutionally protected right to petition our government for political asylum." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982). The Immigration and Nationality Act and the United States' obligations under international law evince "a clear intent to grants aliens the right to submit and the opportunity to substantiate their claim for asylum." Id.; see also Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984).

In enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 480 U.S. 421, 427, 94 L. Ed. 2d 434 (1987). All human beings "shall enjoy fundamental rights and freedoms without discrimination." 1951 Convention Relating to the Status of Refugees, preamble. Among these fundamental rights is "the right to seek and to enjoy in other countries asylum from

persecution." Universal Declaration of Human Rights, art. 14.

Although the right to apply for asylum is a "fragile" right, it "is nevertheless a valuable one to its possessor. By it he may at least send his message and be assured of the ear of the recipient." Haitian Refugee Center, 676 F.2d at 1039 (internal footnotes and citations omitted). The BIA and the Sixth Circuit turned a deaf ear to Ms. Ljucovic's plea, not because of the merits of her case, but because she could not timely file a petition for review.

1. Ms. Ljucovic Lost the Opportunity to Establish that she is a Bona Fide Refugee

Had Ms. Ljucovic received adequate representation, she could have established that she suffered past persecution. Although the IJ found Ms. Ljucovic credible and agreed that she has a subjective fear of persecution in Serbia and Montenegro, the IJ denied her claim for two reasons, neither of which are supported by law. First, the IJ compared her two unnamed ethnic Albanian women who had served as court interpreters in discounting the objective evidence documenting the prevalence of domestic and gender-based violence in Serbia and Montenegro. Second, the IJ did not believe that domestic violence, which the

government would not and could not stop, constituted persecution under 8 U.S.C. § 1101(a)(42)(A).

The IJ erred as a matter of law and violated the basic principles of asylum adjudication by basing her decision on her personal observations of two ethnic Albanian women who appeared in her court as interpreters. These women were not named, were not made available for cross-examination, and Ms. Ljucovic has no way to verify, or even respond to, this argument. The Sixth Circuit previously found "troubling" this same IJ's reliance on out-of-court statements from her clerk in denying an asylum claim. Vasha v. Gonzales, 410 F.3d 863, 872 (6th Cir. 2005).

Domestic violence can form the basis of a valid asylum claim where a government is unable or unwilling to take steps to prevent the abuse. Aguirre-Cervantes v. INS, 242 F.3d 1169 (9th Cir. 2001) *vacated for stipulated reopening* 273 F.3d 1220 (9th Cir. 2001); see also Matter of S-A-, 22 I. & N. Dec. 1328 (BIA 2000) (granting asylum to an alien based on her father's religiously-motivated abuse of her).

The Attorney General has directed the BIA to withhold adjudication and reconsideration of gender-based

asylum claims until the publication of a final rule providing guidance for these cases. Matter of R-A-, 22 I. & N. Dec. 906, 906 (BIA 1999, A.G. 2001); 65 Fed. Reg. 76,588 (Dec. 7, 2000). The IJ will benefit from the guidance provided by the Attorney General, the BIA, and the federal courts acknowledging the validity of gender and domestic violence-based claims and providing a framework for evaluating these claims. Lacking this guidance, the IJ relied on the same type of personal opinion, conjecture, and speculation that the federal courts have consistently rejected. See, e.g., Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002); Aguilera-Cota v. INS, 914 F.2d 1375, 1381 (9th Cir. 1990).

2. Ms. Ljucovic Lost the Opportunity to Pursue her Humanitarian Asylum Claim

Even if the IJ correctly determined that there is not a reasonable possibility that Ms. Ljucovic will be persecuted in Serbia and Montenegro, she nevertheless remains eligible for "humanitarian" asylum if there is a reasonable possibility that she will suffer "other serious harm." 8 C.F.R. § 1208.13(b)(1)(iii)(B). This regulation went into effect on January 5, 2001, after the IJ's decision and after briefing was completed with the BIA. "Other

serious harm" is "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution." 65 Fed. Reg. 76,121, 76,127 (2000).

The 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention") provides that the nation of refuge should not return a refugee to his native country in the absence of a well-founded fear of persecution if the refugee "is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality." 1951 Convention Article 1C(5). This "general humanitarian principle" acknowledges that a refugee who "has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, *in view of his past experiences, in the mind of the refugee.*" Matter of Chen, 20 I. & N. Dec. 16, 19 (BIA 1988) (emphasis added) (internal citations omitted).

Conceding that granting humanitarian asylum only where the past persecution was "severe" represented "an overly restrictive approach," the Attorney General sought to "broaden the standards for the exercise of discretion" in humanitarian asylum cases by adding the "other serious harm" ground. 63 Fed. Reg. 31,945, 31,947 (June 11, 1998). "For example, there may be cases where it is appropriate to offer protection to applicants who have suffered persecution in the past and who are at risk of future harm that is not related to a protected ground." Id.

Ms. Ljucovic never had the chance to present this claim because of Mr. Kulics' ineffective assistance of counsel.

3. Ms. Ljucovic Became Subject to Civil and Criminal Penalties and a Ten Year Bar on Admission Because she Received Ineffective Assistance of Counsel

Mr. Kulics' ineffective assistance of counsel also prevented Ms. Ljucovic from timely complying with the BIA's order. Beginning April 1, 1997, an alien who accrues more than one year of unlawful presence and then departs the United States cannot return to the United States for ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II). Ms. Ljucovic

is ineligible for a waiver of this bar because she lacks a qualifying relative. 8 U.S.C. § 1182(a)(9)(B)(v).

Ms. Ljucovic was not accruing unlawful presence until the BIA denied her asylum application on July 1, 2002 because the time during which her asylum application was pending did not count as unlawful presence. 8 U.S.C. § 1182(a)(9)(B)(iii)(II). Had Ms. Ljucovic left the United States within one year of July 1, 2002, or if she filed a timely petition for review, she would not be subject to the ten-year unlawful presence bar. She would therefore be eligible to return to the United States at such time that she receives an immigrant or nonimmigrant visa.[2] In the future, Ms. Ljucovic will be eligible for an immigrant visa as the sister of a United States citizen. 8 U.S.C. § 1153(a)(4).

II. The Court Should Resolve a Split Among the Circuit Courts of Appeal Concerning the Prejudice to an Alien when her Attorney's Ineffective Assistance Results in the Summary Dismissal of her Appeal

The Sixth Circuit concluded that Ms. Ljucovic was not prejudiced by the loss of her right to seek judicial

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[2] Aliens who leave the United States under an order of deportation are barred from returning for five years but do not have to show "extreme hardship" to a qualifying relative to obtain a waiver of this bar. 8 C.F.R. § 212.2(a).

review. An alien is prejudiced "when the performance of counsel is so inadequate that it may have affected the outcome of the proceedings." Dakane, 371 F.3d at 775. The loss of the right to appeal, because it completely deprives the alien of the appellate proceeding, is presumptively prejudicial. Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1045 (9th Cir. 2000). The Sixth Circuit's decision in this case is in conflict with Dearinger.

In Singh, the BIA dismissed an alien's appeal solely because his attorney failed to file a brief. 367 F.3d at 1186-87. Because the BIA summarily dismissed the appeal on that basis, and not on the merits of the appeal, "counsel's failure to file a timely brief deprived Singh of any meaningful review of the IJ's decision. A presumption of prejudice is thus warranted here." Id. at 1189. The alien did not have to show that he would have won had he filed a brief. Id. This is too high a burden for an alien to meet. Rather, the government has not rebutted the presumption of prejudice "if the alien is able to show 'plausible grounds for relief.'" Id. (internal citations omitted). The alien only had to show "that the BIA could *plausibly* have determined" he was eligible for asylum. Id.

Mr. Kulics' error carries with it a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985 (2000) (internal citations omitted).

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

- Petitioner complied with the procedural requirements for making a claim of ineffective assistance of counsel.
- Petitioner was prejudiced by her attorney's failure to timely notify her of the decision denying her asylum application.

Therefore, Petitioner respectfully prays that the Court grant her petition for writ of certiorari, reverse the decisions of the Sixth Circuit Court of Appeals and the BIA, and reopen the deportation proceedings instituted against her.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

APPENDIX

6TH CIRCUIT:

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filed 12/30/05 ..... A1 - A2

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Oral Decision of the
Immigration Judge
filed 10/15/98 ..... E1 - E18

No. 03-4550

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ZAKE KOLJCEVIC, *Petitioner,*	)	FILED Dec. 30, 2005 Leonard Green, Clerk
v.	)	**ORDER**
ALBERTO R. GONZALES *Respondent.*	)	

BEFORE: DAUGHTREY and GIBBONS, Circuit Judges; and SARGUS,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

*Hon. Edmund A. Sargus , Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 03-4550

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
Aug. 8, 2005
Leonard Green, Clerk

ZAKE KOLJCEVIC, *Petitioner,*	)	
v.	)	**ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS**
ALBERTO R. GONZALES *Respondent.*	)	

Before: DAUGHTREY and GIBBONS, Circuit Judges; SARGUS, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Dusta Ljucovic, a native and citizen of Serbia and Montenegro, applied for asylum. She alleged that she was a victim of domestic abuse and that she suffered persecution because she is an Albanian woman. The immigration judge (IJ) concluded that Ljucovic was credible, but that she had not

*The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

suffered past persecution, nor did she have a well-founded fear of future persecution. The Board of Immigration Appeals (BIA) affirmed without opinion. Ljucovic's attorney mailed the BIA's decision to her. However, perhaps due to an error in the mailing address used by the attorney, Ljucovic did not receive notice of the BIA's decision until ten months later. Ljucovic filed a motion to reopen proceedings with the BIA. The BIA denied her motion to reopen. Ljucovic appealed to this court. For the following reasons, we affirm the BIA's decision.

I.

Ljucovic is a native and citizen of Serbia and Montenegro who entered the United States on November 1, 1990. On approximately August 22, 1996, Ljucovic filed an application for asylum with the assistance of attorney Richard Kulics. She alleged that she had suffered persecution on account of her religion[1] and because she is an ethnic Albanian female. She documented that Albanian women are not allowed to be educated, nor are they allowed to communicate in their native language. She also

[1] Ljucovic never presented any evidence of persecution on account of her religion, despite this statement in her application.

alleged that she was forced to marry a man who eventually abused her. When she reported the abuse to the police, they refused to take any action.

The Immigration and Naturalization Service (INS) referred her application to an IJ and issued an order to show cause, alleging that Ljucovic was deportable for entering the United States without inspection.

Kulics represented Ljucovic before the IJ at a hearing in Detroit, Michigan on October 15, 1998. At the hearing, Ljucovic testified that her husband beat her constantly during their four-month marriage. She went to the police station on one occasion to report the beating, and the police "just start[ed] laughing and teasing with one another." She decided that she had to get away from her husband. She left her home and came to the United States in November 1990. She divorced her husband after she arrived in the United States.

The IJ determined that Ljucovic was credible and had a subjective fear of returning to her native country. However, the IJ also concluded that Ljucovic was not a victim of past persecution on account of her gender and there was no evidence that she would suffer future persecution should she return to Serbia and Montenegro.

Ljucovic appealed the IJ's decision to the BIA. The BIA affirmed the IJ's decision without opinion on July 1, 2002.

During the time the appeal was being considered by the BIA, Ljucovic moved to a new residence in Michigan. She notified Kulics of the change in address within a week of her move. Kulics apparently received the change of address information, but erroneously transcribed the zip code as 48313 rather than 48312 in his records.

According to Ljucovic, Kulics never notified her of the BIA's decision and she did not learn of it until May 2, 2003. Kulics told Ljucovic that he mailed a copy of the decision to her and that it was not his policy to call his client after mailing the decision.

Ljucovic subsequently filed a motion to reopen her case with the BIA on June 19, 2003. Although her motion was filed more than ninety days after the BIA rendered its decision, Ljucovic argued that equitable tolling should excuse her failure to timely file because she received ineffective assistance of counsel. Further, Ljucovic asked the BIA to hold her case in abeyance until the Attorney General issued final rules on gender-based asylum claims.

On November 18, 2003, the BIA denied her motion to reopen the case. The BIA concluded that Ljucovic did

not set forth in detail in her affidavit the agreement that was entered into with Kulics with respect to his representation and, thus did not comply with the requirements set forth in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988), to establish ineffective assistance of counsel. Additionally, the BIA determined that she was not prejudiced by any ineffective assistance of counsel. The BIA declined to apply equitable tolling to her motion to reopen the case and concluded that her motion was untimely.

Ljucovic filed a timely notice of appeal.

II.

This court reviews the denial of a motion to reopen for abuse of discretion. *See INS v. Doherty*, 502 U.S. 314, 323 (1992); *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000). An abuse of discretion exists with respect to BIA proceedings when the denial of a motion to reopen "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Balani v. INS*, 669 F.2d 1157, 1161 (6th Cir. 1982).

III.

Under BIA regulations, a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.2 (c)(1). A motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.*

Most pertinent to the current case, a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." *Id.* § 1003.2(c)(2). In this case, the BIA affirmed without opinion the IJ's decision on July 1, 2002. Ljucovic therefore had ninety days from that date to file her motion to reopen the proceedings. She did not file a motion to reopen until June 17, 2003, almost one year after the final decision was rendered in her case.

We have previously observed that equitable tolling can apply when a petitioner files an otherwise time-barred motion to reopen. *See Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004) ("This court has previously noted

that the time for filing a motion to reopen can be equitably tolled.") (citing *Miculi v. Ashcroft*, 96 Fed. Appx. 338, 339 (6th Cir. 2004)). Equitable tolling may apply when a petitioner has received ineffective assistance of counsel.[2] *See Miculi*, 96 Fed. Appx. at 340 ("Equitable tolling has been found to apply to motions to reopen based on ineffective assistance of counsel."); *Hermiz v. INS*, 86 Fed. Appx. 44, 44 (6th Cir. 2003) ("[S]ome courts have held that the ineffective assistance of counsel may provide grounds for equitable tolling if the petitioner has been diligent in pursuing his rights."); *see also Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000).

Petitioners alleging ineffective assistance of counsel must satisfy the requirements set forth in *Matter of Lozada*, 19 I & N Dec. at 639; namely, the allegation must be

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[2] The government's argument that there is no right to effective assistance of counsel in immigration proceedings is not well-taken. The government contends that the right to effective assistance of counsel is limited to criminal proceedings. However, this court has already decided that the "Fifth Amendment guarantees of due process extend to aliens in deportation proceedings." *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001). An alien receiving ineffective assistance of counsel can suffer a deprivation of due process; thus, the alien's right to effective assistance of counsel is grounded in the Fifth Amendment. *Id.*

supported by (1) an affidavit describing the agreement that was entered into with the attorney with respect to the actions to be taken and the representations made by the attorney; (2) proof that the petitioner has notified the attorney of the allegations and that the attorney has had an opportunity to respond; and (3) a statement about whether a complaint has been filed with an appropriate disciplinary authority if the representation involved a violation of legal obligations to the client. In addition, the petitioner must demonstrate that he or she was prejudiced by the ineffective assistance of counsel. *See id.* at 640. Prejudice in this context requires a showing that the petitioner was entitled to the underlying relief requested. In other words, the petitioner "must establish that but for [counsel's error], [petitioner] would have been entitled to continue residing in the United States." *Huicochea-Gomez*, 237 F.3d at 699-700.

Ljucovic's motion to reopen based upon ineffective assistance of counsel complies substantially but not entirely with the *Lozada* requirements. Ljucovic submitted proof that she notified Kulics of her claim that he provided her with ineffective assistance of counsel. She also provided a

copy of her grievance filed with the Attorney Grievance Commission in Michigan.

It is a closer question as to whether Ljucovic complied with the *Lozada* requirement that she describe the agreement entered into with her attorney. She submitted an affidavit simply stating that she hired Kulics to "prepare and file my application for asylum" and to "appeal to the Board." She further documented that Kulics apparently mailed the BIA's decision to her, but that he had the incorrect zip code on the letter, and that it was "not his policy to call or follow-up after he mails the decision." She also stated that her brother-in-law, Frank, called Kulics on July 5, 2002, and that Kulics did not tell Frank about the BIA's decision of July 1, 2002.[3] Ljucovic thus detailed the apparent shortcomings of Kulics's representation. However, except for a cursory statement about hiring Kulics, she does not set forth any detail as to her agreement

[3] It is entirely possible that Kulics did not know of the BIA's decision when he spoke to Frank. The BIA issued its decision on July 1, 2002, and subsequently mailed a copy of the decision to Kulics. Given that Frank spoke to Kulics only four days after the BIA made its decision, the decision may not yet have arrived at Kulics's office.

with Kulics about her representation and specifically does not state how she and Kulics agreed that she would be notified of any BIA decision. Her affidavit in support of her motion to reopen based upon ineffective assistance of counsel falls short of the procedural *Lozada* requirements for failure to adequately describe the agreement she entered into with her attorney. *See Hamid v. Ashcroft*, 336 F.3d 465, 468 (6th Cir. 2003) (concluding that an alien's affidavit did not meet *Lozada* requirements when the affidavit "recount[ed] Hamid's allegations concerning what his counsel failed to do, but d[id] not mention what actions his counsel promised to undertake").

Relying on the Michigan Rules of Professional Responsibility, Ljucovic argues that one of Kulics's basic duties was to keep her informed of important developments in her case and that this was an implicit understanding reached when he agreed to represent her. Even if we could infer such an implicit agreement with regard to Kulics's representation, the affidavit still falls short. It simply fails to provide any detail concerning what representation Kulics agreed to provide because the only information provided is that Ljucovic hired him to represent her. *Lozada* requires more information than that which Ljucovic submitted in her

affidavit, as it demands information about the actions to be taken and the representations made by the attorney about those actions. *See Lozada*, 19 I & N Dec. at 639. The BIA did not abuse its discretion in concluding that Ljucovic did not comply with the *Lozada* requirements.

Even if Ljucovic satisfied the *Lozada* requirements, she would also have to demonstrate that she was prejudiced by ineffective assistance of counsel. *See id.* at 640. A demonstration of prejudice requires that the petitioner establish that but for her attorney's actions, she would have been able to remain in the United States. *Huicochea-Gomez*, 237 F.3d at 699-700.

Ljucovic alleges that she was prejudiced because Kulics's failure to notify her of the BIA's decision cost her the opportunity to appeal the decision to this court. She claims that if she had been able to appeal, she would have been able to demonstrate that she suffered past persecution and has a well-founded fear of returning to Serbia and Montenegro. She also argues that the BIA should have withheld its decision in this case until final rules have been promulgated regarding gender-based asylum claims. Finally, she contends that she was prejudiced because she was unable to timely comply with the BIA's order and she

therefore began accruing unlawful presence. Because she accrued over a year of unlawful presence, she cannot return to the United States for ten years without government consent. *See* 8 U.S.C. § 1182(a)(9)(B).

Ljucovic certainly suffered adverse effects when she did not learn of the BIA's decision until approximately ten months after it issued. However, the loss of a right to appeal the BIA's decision to this court and the accrual of unlawful presence do not constitute prejudice under this circuit's law. Under *Huicochea-Gomez*, Ljucovic must establish that but for Kulics's failure to notify her of the BIA's decision, she "would have been entitled to continue residing in the United States." 237 F.3d at 699-700. While another circuit appears to allow the alien to demonstrate prejudice based upon the loss of a right to appeal, *see Dearinger* ex rel. *Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) (concluding that "where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely" and thus prejudice should be presumed), this court has adopted a more stringent standard. Ljucovic's allegations that her counsel's ineffectiveness prevented her from filing an

appeal or caused her to accrue unlawful presence do not demonstrate that she would have been able to remain in the country had she received timely notification of the BIA's decision.

Ljucovic claims that if she had been able to appeal, she would have been able to demonstrate that she suffered past persecution and continues to have a well-founded fear of returning to her native country. The IJ determined that Ljucovic was "essentially credible" and that she "has a subjective fear of returning to Yugoslavia." However, the IJ concluded that she had not established past persecution, because the acts of her husband in subjecting her to domestic violence do not constitute persecution. Further, the IJ concluded that even if she established past persecution, there was evidence of changed circumstances. Ljucovic and her husband divorced after she left Yugoslavia, eliminating the possibility that she would be subject to domestic violence at his hands if she returned.

Ljucovic presents no compelling evidence suggesting that the IJ's decision would have been overturned on appeal to this court under a substantial evidence review and that she would have been entitled to remain in the United States. *See INS v. Elias-Zacarias*, 502

U.S. 478, 481 (1992) (stating standard of review of BIA's decision). At the hearing and in her application, she alleged that she had been beaten over a four-month period by her husband and that, when she reported this abuse to the police on one occasion, the police did not take her claims seriously. Even if this did rise to the level of past persecution, Ljucovic cannot demonstrate a well-founded fear of future persecution. Ljucovic divorced her husband in 1990 or 1991 and thus would not be subject to his abuse were she to return to her native country. *See* 8 C.F.R. § 208.13(b)(1)(i)(A) (IJ shall deny an asylum application if "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality").

In her application, she also alleged that she was denied certain opportunities, such as an education, because she is an Albanian woman. The IJ's conclusion that the denial of these opportunities did not constitute past persecution was supported by substantial evidence. The State Department reports establish that women in her native country are subjected to traditional gender roles. Such evidence does not demonstrate persecution. We have held that persecution requires more than just harassment or

discrimination. *Mikhailevitch v. INS*, 146 F.3d 384, 389 (6th Cir. 1998). The petitioner must demonstrate that there has been some "physical punishment, infliction of harm, or significant deprivation of liberty." *Id* at 390. While relegating women to their traditional roles may demonstrate discrimination, Ljocovic has not adduced any evidence that she was also subjected to physical punishment, harm, or a deprivation of liberty (other than the abuse at the hands of her husband) on account of her gender. The denial of opportunities for women, while unfortunate, does not rise to the level of persecution. For these reasons, Ljucovic would not have succeeded in reversing the IJ's determination that she did not suffer past persecution and that she did not have a well-founded fear of future persecution. She cannot demonstrate that she would have been allowed to remain in the United States if she had been able to appeal to this court.

Ljucovic failed to comply with the *Lozada* requirements and additionally did not establish prejudice stemming from her attorney's failure to timely notify her about the BIA's decision. Therefore, she cannot establish ineffective assistance of counsel in order to have the statute of limitations on her motion to reopen equitably tolled. The

BIA did not abuse its discretion in denying her motion to reopen.

IV.

For the foregoing reasons, we affirm the BIA's decision.

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: A75-246-287 - Detroit Date: Nov. 18, 2003

In re: DUSTA LJUCOVIC

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Marshal E. Hyman, Esquire

ON BEHALF OF DHS:
Michael B. Dobson, Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(1)(B), I&N Act
[8 U.S.C. § 1251(a)(1)(B)] -
Entered without inspection

APPLICATION: Reopening

The respondent's case was last before the Board on July 1, 2002, when we affirmed the Immigration Judge's decision denying the respondent's application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and withholding of deportation under

section 243(h) of the Act, 8 U.S.C. § 1253(h). The respondent filed a motion to reopen on June 19, 2003. The motion will be denied.

The respondent's motion to reopen asserts that ineffective assistance of counsel prevented her from timely filing her motion to reopen. Specifically, the respondent asserts that her counsel failed to advise her of the Board's decision dated July 1, 2002, and, thus, she failed to timely seek further review.

Pursuant to the regulations at 8 C.F.R. § 1003.2 (c)(2), only one motion to reopen is allowed and must be filed with the Board not later than 90 days after the date on which the final administrative decision was rendered, or on or before September 30, 1996, whichever date is later. However, equitable tolling of deadlines and numerical limitations on motions to reopen may apply when an alien is prevented from filing because of ineffective assistance of counsel, as long as the alien acts with due diligence in discovering the deception, fraud, or error.[1] A motion to

[1] In *Scorteanu v. INS*, 339 F.3d 407, 413 (6th Cir. 2003), the Sixth Circuit Court of Appeals indicated that the Board has acknowledged that ineffective assistance of counsel may result in equitable tolling. However, the Sixth Circuit Court of Appeals declined to decide whether ineffective assistance of counsel would result in equitable tolling.

reopen based upon a claim of ineffective assistance of counsel requires: (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representation counsel did Of did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and given an opportunity to respond; and, (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *See Matter of Assaad*, 23 I&N Dec. 553, 556 (BIA 2003); *cf Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *see also Hamid v. Ashcroft*, 336 F.3d 465 (6th Cir. 2003). Furthermore, the respondent must show that he was prejudiced by his representative's performance. *See Matter of Assaad, supra.*

In this case, the respondent failed to comply with the requirements set forth in *Matter of Lozada, supra.* While the respondent submitted an affidavit, the affidavit fails to set forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what

representation counsel did or did not make to the respondent. The affidavit merely recounts what her counsel failed to do, but does not mention what actions her counsel promised to undertake. As a result, the respondent has failed to comply with the *Lozada* requirements. *See Hamid v. Ashcroft, supra.*

In addition, the respondent failed to show that she was prejudiced by ineffective assistance of counsel. The respondent claims that she was prejudice because she was deprived of an opportunity to seek further review such as a motion to reconsider. However, a motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred. *See* 8 C.F.R. § 1003.2(b)(3). Likewise, she claims that she has been prejudiced because she is now an alien unlawfully present in the United States and, thus barred from seeking admission to the United States for either 3 or 10 years under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i). However, she erroneously assumes that she would necessarily be eligible for admission to the United States within the next 10 years except for the bar under section 212(a)(9)(B)(i) of the Act. Section 212

(a)(9)(B)(v) of the Act also provides for a waiver of the bar. Thus, the respondent has failed to establish that she has been prejudiced by ineffective assistance of counsel. *See Matter of Assaad, supra.* Consequently, her motion to reopen is untimely and, thus, barred.

ORDER: The respondent's motion to reopen is denied.

/s/ Fred Hess
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: A75-246-287 - Detroit Date: July 1, 2002

In re: LJUCOVIC, DUSTA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kulics, Richard A., Esquire

ON BEHALF OF SERVICE:
Michael B. Dobson, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

/s/ Gus Villageliu
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
Detroit, Michigan

File No.: A75-246-287

In the Matter of	)	
DUSTA LJUCOVIC,	)	**IN DEPORTATION**
Respondent	)	**PROCEEDINGS**

Charge: Section 241(a)(1)(B) of the Immigration and Nationality Act, as amended - Entry without inspection.

Applications: Section 208/243(h) of the Immigration and Nationality Act, as amended - Asylum and withholding of deportation.

On Behalf of Respondent:
Richard A. Kulics, Esq.
237 N. Woodward, Ste. 5
Birmingham, Michigan 48009

On Behalf of Service:
Michael B. Dobson, Esq.
Assistant District Counsel
33 Mt. Elliot
Detroit, Michigan 48207

ORAL DECISION OF THE IMMIGRATION JUDGE

Background

The respondent is a 31-year-old woman, native and citizen of Yugoslavia, who last entered the United States on or about November 1, 1990, without inspection. The

Immigration and Naturalization Service (hereinafter "the Service") commenced deportation proceedings against the respondent, charging her with deportability under section 241(a)(1)(B) of the Immigration and Nationality Act (hereinafter "the Act").[1]

At the deportation hearing, the respondent admitted the factual allegations contained in the Order to Show Cause (Exhibit 1) and conceded deportability. Based upon these admissions, deportability has been established by clear, convincing and unequivocal evidence. Because the respondent declined to designate a country of deportation, Yugoslavia has been directed pursuant to section 243(a) of the Act, should such action become necessary.

The respondent has submitted an application for asylum under section 208 of the Act, which, when made at the institution of deportation proceedings, is also considered a request for withholding of deportation under

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[1] These proceedings were commenced prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-207, 110 Stat. 3009, and citations to the Act reflect the Immigration Act as it stood prior to the effective date of IIRIRA.

section 243(h). These are the sale forms of relief before the Court.

Asylum and Withholding of Deportation

An applicant for asylum or withholding of deportation bears the evidentiary burdens of proof and persuasion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified, Matter of Mogharrabi, 19 I&N Dec. 439.

An applicant for withholding of deportation must demonstrate a clear probability of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Stevic, 467 U.S. 407 (1984). The court in Stevic held that the "clear probability" standard requires a showing that it is more likely than not that she would be subject to persecution.

An applicant for asylum must demonstrate that she is a "refugee II within the meaning of section 101(a)(42) of the Act which requires her to show that she is unwilling or unable to return to her country of nationality (or if having none, the country in which she last officially resided) because of past persecution or a well-founded fear of persecution on account of one or more of the statutorily enumerated grounds.

The Supreme Court has held that the term "well-founded fear" and "clear probability" are significantly different. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

Facts

The respondent's claim is centered upon her fear of persecution if she returns to Yugoslavia based upon her membership in a particular social group and religion. See Exhibit 2, part C, question four. The respondent asserts in her application that because of her ethnic derivation and female gender as composing the social group, she has experienced mistreatment and threats throughout her life. She asserts that many ethnic Albanian women in Montenegro do experience the same types of mistreatment that have been inflicted upon her. She states that she was not allowed to be educated beyond the fourth grade, and was precluded from seeking higher education, both by the Yugoslav government and the customs of her group.

The respondent asserts that when she was "fortunate" to marry, she was physically abused on repeated occasions and precluded from making reports of this abuse to the

authorities. The respondent asserts that one of the reasons that she was prevented from making reports was that the police would not take her report seriously in that country or that society. See Exhibit 2, part C, question four.

The respondent asserts that if she were to return to Serbia, Montenegro, she would be forced to return to a life of servitude and servility. She states that because she is now beyond the "marriageable age" in the Albanian community and has experienced failure at marriage, her chances of residing comfortably within the Albanian community in a normal manner are nonexistent.

The respondent testified at hearing before this Court with respect to her claims. She testified that she was raised in a rural village in Montenegro. She stated that she is Catholic and was permitted to attend school by her family for four years. She testified that her education was finished by familial withdrawal of her from school at the age of 10. The respondent testified that thereafter she remained at home and assisted her mother in "female" chores of working around the house, cleaning, washing, cooking and assisting in raising her five siblings.

The respondent testified that at 22 years of age, her father was engaged in business with her future husband's

uncle. She testified that during the course of these business dealings, her husband's uncle approached her father about a marriage on behalf of his nephew to her. The respondent testified that her father presented her with the fait accompli of a marriage. She testified she met her husband for the first time when he was brought to the family home. The respondent asserted that she indicated to her father she did not wish to marry her proposed husband, but her wishes were disregarded by the family. The respondent testified that it was an arranged marriage and her mother advised her that her future Spouse was from a good family, and she would marry him anyway.

The respondent testified that she was married for approximately one month after meeting her husband in a civil ceremony at a city hall. She testified that she was taken to that building by her husband's family and returned to her husband's home after marriage. The respondent testified that her life was somewhat unchanged in that her husband also resided in a very small, rural farming village. She testified that it was a very bad marriage, and felt that she had to get away. The respondent testified that approximately two to three weeks after she entered into the marriage, her husband beat her. She testified that in the

Albanian culture, a custom following marriage is for the bride to return three weeks after the wedding to visit her family. The respondent testified that when she approached her husband about fulfilling her obligations pursuant to her cultural customs, her husband beat her, and refused to permit her to go. The respondent testified that he beat her following that occasion.

The respondent testified that on a social occasion shortly thereafter, she was permitted by her husband to visit her family. She testified that on that occasion she approached her mother and advised her of the situation in which she found herself. The respondent testified that she told her mother she couldn't stay with her husband, and her mother advised her that she had to stay with her husband. She testified that she returned home.

The respondent testified that on another occasion, she was very badly beaten by her husband. She testified that following the beating, she went to the police station in the village with the intent to report the domestic abuse. The respondent testified that she was advised by the police to sit and wait in the waiting area and a report would be taken. The respondent testified that while sitting in the area, she

observed the policemen laughing and joking and felt that the jokes were directed towards her.

The respondent testified that after sitting there, she looked up and observed her husband entering the police station, and he took her home. The respondent testified that she was beaten by him again on that occasion. The respondent testified this was the only occasion in which she sought to make a report to the police. She testified that because of her experience on that occasion, she felt it was futile to seek any assistance from the police.

The respondent testified that following this occasion, she decided to leave the area. She testified that she began by traveling to the city of Tuzi and into the marketplace. She testified that she approached several young women and asked them for information as to how to locate an individual who would help her escape from her situation. She testified that she was sent to someone who indicated he could arrange for her to get her papers. The respondent testified that she provided this individual with her passport and he advised her that she would have to wait until a full group was put together for her departure.

The respondent testified that shortly thereafter she was notified by one of the group members that the

arrangements had been made. She testified she packed a suitcase upon receiving this information and immediately left the home without advising anyone of her whereabouts or her intentions. The respondent testified that she left and traveled to the city of Titograd, Zagreb and Germany. The respondent testified that when in Germany, she contacted her brother residing in the United States, who agreed to provide her with funds for the balance of her journey.

The respondent testified that the individual arranger had arranged for the group to travel to Cancun, Mexico, and eventually travel to the southern border of the United States where she effected her illegal entry into the United States.

The respondent testified that she has neither seen nor communicated with her parents or other siblings in Yugoslavia. She testified that following her departure she somehow became aware of the fact that her husband had entered into a divorce in Yugoslavia against her. She testified that she herself felt that when she left her husband that she had in effect divorced him. The respondent testified that she sought the assistance of her brother in the United States and he obtained a divorce decree from Yugoslavia. See Exhibit 6. The divorce decree was

apparently obtained by her ex-husband following the departure of his wife. The basis contained within the divorce decree indicates that the plaintiff asserted that the marriage was a fiction and the marriage was dissolved.

The respondent testified that she would be unable to return to Yugoslavia because she is well beyond what is considered to be marriageable age in her culture. She testified that because she has been divorced, she would be culturally precluded from marrying anyone else of her ethnic group.

The respondent testified concerning the domestic violence which she experienced, stating that her husband struck her on several occasions. She testified that she was struck in the face and the back, but on each occasion was struck with husband's fist.

The respondent was cross-examined extensively by Government counsel. The respondent's testimony was essentially consistent with the information provided on direct examination. The respondent asserted that she did not see any assistance in Yugoslavia because she would be unable to support herself and she had no friends or family in any other parts of either Serbia or Montenegro or any of the other federations within the former Yugoslavia.

Credibility

Having considered the material submitted by the respondent and listening carefully to her testimony, I must state that I do find the respondent to be essentially credible. The Court finds that the respondent's testimony concerning her experiences in Yugoslavia seem to be very consistent throughout both direct and cross-examination and questions by this Court. IT is certainly clear that this respondent has a subjective fear of returning to Yugoslavia. However, a subjective fear along is not sufficient to qualify for either form of relief without an objective basis.

State Department Opinion

Pursuant to regulation, the Court has solicited and received from the Department of State an opinion concerning the asylum application. See Exhibit 5. The Court did receive the April 1998 update on Profile of Asylum Claims and Country Conditions from Serbia/ Montenegro and the April 1997 full report. In addition, the Immigration and Naturalization Service has provided copies of the 1997 Country Reports on Serbia/Montenegro published by the Department of State in 1998. In addition to the background materials provided by the Government and Department of State, the respondent has submitted a

number of materials with her original application for asylum, provided to this Court today. See Exhibit 7. The respondent has also submitted additional background materials at Exhibit 3.

The 1997 Country Report does support the claims of the respondent with respect to the existence of domestic violence in the former Yugoslavia. See Exhibit 4. The report at page 1278 indicates that there has been a traditionally high level of domestic violence which has persisted through 1997. It indicates, however, a few agencies which are dedicated to coping with family violence, and these are inadequately resourced. Moreover, the options are somewhat limited by pressures to keep families together. The report goes on to note that few victims of spousal abuse file reports with the authorities. It does not indicate that the authorities do not pursue the reports throughout former Yugoslavia.

It is clear that Yugoslavia does have traditional patriarchal ideas of gender roles and that women are in that culture, not only in Albanian but in other cultures in former Yugoslavia considered to be subservient to the male sex. See Exhibit 4 at page 1279.

Analysis

The fundamental requirement to establish eligibility for asylum is to establish either past persecution, coupled with the showing of the likelihood of present or future persecution. Matter of Chen, 20 I&N Dec. (BIA 1989). Persecution also must meet the statutory requirements, that is, that persecution must be on account of one of the five grounds specified in the Act. Matter of H-, Int. Dec. 3276 (BIA 1976). The respondent has articulated religion and membership in a particular social group as the basis which she asserts she has experienced persecution. The social group has been defined in Board precedent as a group of persons who share a common, immutable characteristic. Matter of Acosta, supra; Matter of Moqharrabi, supra. In Matter of Acosta, supra, at 233-234, the Board set forth characteristics which might constitute a "particular social group." These included innate characteristics such as sex, color, or kinship ties, or in some instances, a shared past experience such as former military leadership or land ownership. The particular group characteristic must be one which defines the group, and it must be one which members of the group either cannot change or should not

be required to change because it's so fundamental to their individual identities or conscience. Matter of Acosta, supra.

The respondent argues that she has been the victim of gender-based persecution. In support of this thesis, she has posited a denial of educational opportunity, and domestic violence. She indicates that these identify her as a member of a particular social group which is identified by gender. The record in this case does not support the respondent's claims. The respondent has submitted some articles, many of which go back to the 19th century, discussing the status of women in Yugoslavia and Albanian women in particular. However, the respondent has submitted no evidence to support her claim that all Albanian women are required to leave school as a matter of culture or practice after four years of education. In this court, on numerous occasions, this Court has had Albanian women, both from Yugoslavia and Albania itself who have acted as interpreters in many cases. One of these women entered this country as a Fullbright scholar, pursuing medical research in immune deficiency problems. Another Albanian woman from Montenegro, who acts as interpreter in these proceedings, was educated in the law at the University of Prishtina in Kosovo. These are two of a

number of women who have been educated, not in the United States, as children of immigrants or young immigrant children who entered, but rather women who were educated in the crucible of the culture that this respondent asserts, as a matter of course, oppresses all women and subjects them to domestic violence. The respondent has not submitted evidence of this claim.

With respect to the respondent's claim of persecution as a woman who has experienced domestic violence, this Court must first assert that as a judge, a lawyer, and a woman, I do not endorse or support the use of domestic violence against man, woman or child, nor I must assert, does any attorney sitting in this courtroom in front of me today, condone the use of force against another human being. Having said that, I must also state that the asylum law provides that persecution must be directed against a person based upon one of the five enumerated categories. Victims of domestic violence are not defined by gender or culture. The respondent has submitted no evidence which supports her assertion. After carefully considering the testimony in this case, I must indicate I cannot find the respondent is or was a victim of past persecution on account of a particular social group. The

respondent has submitted no evidence of persecution on account of religion. The respondent's assertions of denial of educational opportunity because she is a woman are not supported by the objective evidence in this material or any evidence which has been presented to this Court.

The respondent has asserted that she was not able to seek protection from the authorities. The respondent would posit that the appearance of her husband at the police station was in some way linked to the cultural morays of the area and the practices of the police. Other than positing this thesis, there has been no evidence to support it. There is no indication that the police were Albanian men who refused to pursue the respondent's complaint, and take a report, or that they in some way were connected with the husband's appearance at the police station. It merely appears that there was a delay in taking the respondent's report, and during this delay, her husband appeared. While one explanation clearly could be that her husband was notified by the police, equally, in a village of the size the respondent describes, it is equally possible that someone else saw her going to the police station and reported a somewhat unusual circumstance to her husband, and he appeared as a result of that. Many basis could be speculated

for her husband's appearance. Private acts, even including being struck by a husband, do not constitute past persecution. Even assuming for the sake of argument that the actions did rise to the level of past persecution, there is clearly a change in the circumstances here which directly affect this claim. The respondent herself has submitted evidence of such changed circumstance. See Exhibit 6. After the respondent's departure, her husband divorced her. She has testified that she would not be required to remarry or permitted to remarry. Indeed, during her residence in the United States, she has apparently not remarried here. Her fear of returning to Yugoslavia to her husband's control have been substantially eliminated by the divorce. There is no evidence that she would be-returned to that situation or, indeed, a similar situation where she might experience actions which she asserts are persecution.

For these reasons, the Court cannot find the respondent has been subjected to past persecution in Yugoslavia, and, moreover, there is no evidence which would support a finding of future persecution should she be returned to that country. The respondent might not be accepted back into her family. She certainly will not be returned to her husband following a divorce, and while life

may be difficult in that area, a return to that country would not subject her to persecution.

The respondent has not sought other relief from this Court, and I am limited to a grand of that relief which is requested. Accordingly, the following orders will be entered:

ORDER:

IT IS ORDERED that the respondent's application for asylum and withholding of deportation, be and hereby are denied; and,

IT IS ORDERED that the respondent be deported from the United States to Montenegro on the charges contained in the Order to Show Cause.

/s/ Elizabeth A. Hacker
Elizabeth A. Hacker
U.S. Immigration Judge

October 15, 1998

Supreme Court, U.S.
FILED
AUG 4 - 2006
OFFICE OF THE CLERK

(2)

No. 05-1265

In the Supreme Court of the United States

DUSTA LJUCOVIC, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was entitled to reopening of an administrative decision denying her application for asylum when petitioner (1) filed a motion to reopen well after the deadline for such a motion had passed and (2) alleged that the time for filing the motion should be tolled because her former attorney had negligently failed to give her prompt notice of the administrative decision.

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In the Supreme Court of the United States

No. 05-1265

DUSTA LJUCOVIC, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B16) is not published in the *Federal Reporter* but is *reprinted in* 144 Fed. Appx. 500. The opinion of the Board of Immigration Appeals (Pet. App. C1-C5) is unreported. The decision of the immigration judge (Pet. App. E1-E18) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 2005. A petition for rehearing was denied on December 30, 2005 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on March 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes the legal framework governing removal of aliens from the United States. The INA specifies the grounds on which aliens may be removed, see 8 U.S.C. 1227(a) (2000 & Supp. III 2003), and the manner in which removal proceedings are conducted, see 8 U.S.C. 1229, 1229a. The INA also limits the circumstances under which an alien may be removed to a country in which he is likely to experience various forms of persecution. One form of relief that is potentially available to removable aliens is asylum. See 8 U.S.C. 1158(b)(1). To establish eligibility for asylum, an alien must demonstrate, inter alia, a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (defining "refugee"); see 8 U.S.C. 1158(b)(1) (Attorney General may grant asylum if he determines that the applicant "is a refugee within the meaning of section 1101(a)(42)(A)").

2. Petitioner Dusta Ljucovic, an ethnic Albanian from the former Yugoslavia, entered the United States illegally in November 1990 and applied for asylum in 1996. Pet. App. B2, E1. Her asylum application was subsequently referred to an immigration judge (IJ), who considered the application in connection with removal proceedings initiated by the Immigration and Naturalization Service (INS). *Id.* at B2-B3, E1-E3. Petitioner was represented by counsel at the immigration hearing. *Id.* at B3.

Petitioner alleged that her departure from the former Yugoslavia was precipitated by her spousal mistreatment in an arranged marriage. Petitioner testified

that she had often been physically mistreated by her husband, and that on one occasion the local police had rebuffed her request for protection. She further testified that she had fled the country in order to escape the abuse and had ultimately reached the United States. Petitioner and her husband were divorced, apparently at the initiative of her husband, after she departed. Pet. App. E4-E10, E17.

The IJ concluded that petitioner had failed to establish her eligibility for asylum. Pet. App. E13-E18. The IJ found that the domestic violence to which petitioner was subjected was not "on account of" her religion or membership in a particular social group comprised of women of Albanian ethnicity. *Id.* at E15-E16. The IJ also ruled that petitioner had not proved that the Albanian police were unwilling to protect her, and that private domestic violence does not constitute persecution. *Id.* at E16-E17. Finally, the IJ found that petitioner's divorce constituted a material change of circumstances that substantially eliminated the basis for fearing further mistreatment by her former husband. *Id.* at E17.

3. On July 1, 2002, the Board of Immigration Appeals (BIA or Board) affirmed the IJ's decision. Pet. App. D1. In June 2003, petitioner, represented by new counsel, filed a motion in the BIA to reopen her asylum case. See *id.* at C1-C2. The motion requested that the Board reopen the case and either defer a decision on it pending issuance of rules regarding adjudication of gender-based asylum claims, or re-issue its prior decision with a new decision date so that petitioner could seek judicial review or depart from the United States without accruing unlawful presence that would bar her from re-admission to this country. See Mot. to Reopen 1.

Petitioner contended that she "ha[d] fully complied with the prerequisites for filing a motion to reopen based on ineffective assistance of counsel, as set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (1988)." Mot. to Reopen 1. While acknowledging that her motion to reopen was being filed more than 90 days after the BIA's decision, petitioner contended that the time for filing should be equitably tolled because her prior counsel had negligently failed to inform her of the BIA ruling. *Id.* at 2-3, 8. In particular, petitioner alleged that her failure to receive a copy of the Board's decision at an earlier date "most likely" resulted from the fact that her former attorney had recorded an erroneous zip code in transcribing her new address. *Id.* at 6.

On November 18, 2003, the BIA denied petitioner's motion to reopen. Pet. App. C1-C5. The Board noted that, as a general matter, a motion to reopen "must be filed with the Board not later than 90 days after the date on which the final administrative decision was rendered." *Id.* at C2. The BIA acknowledged that "equitable tolling * * * may apply when an alien is prevented from filing because of ineffective assistance of counsel, as long as the alien acts with due diligence in discovering the deception, fraud, or error." *Ibid.* It concluded, however, that petitioner had failed to make the showing required by the Board's prior decisions to establish ineffective assistance of counsel. The BIA explained that the affidavit submitted by petitioner in support of the motion to reopen "fails to set forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representation counsel did or did not make to [petitioner]. The affidavit merely recounts what her counsel failed to do, but does not mention what actions her counsel promised to under-

take." *Id.* at C3-C4. The BIA further held that the motion to reopen should be denied for the additional reason that petitioner had failed to show that she was prejudiced by her prior attorney's alleged ineffectiveness. *Id.* at C4.

4. The court of appeals affirmed the BIA's denial of reopening. Pet. App. B1-B16.[1] The court stated that a motion to reopen must generally be filed within 90 days after the date of the final administrative decision in the proceeding sought to be reopened, *id.* at B6, but that "[e]quitable tolling may apply when a petitioner has received ineffective assistance of counsel," *id.* at B7. The court further explained that "[p]etitioners alleging ineffective assistance of counsel must satisfy the requirements set forth in *Matter of Lozada*," *ibid.*, including the requirement that an allegation of ineffective assistance "must be supported by * * * an affidavit describing the agreement that was entered into with the attorney with respect to the actions to be taken and the representations made by the attorney," *id.* at B7-B8. The court of appeals found that, although petitioner's affidavit in support of the motion to reopen described the alleged deficiencies of her former attorney's representation, the affidavit did not "set forth any detail as to her agreement with [the attorney] about her representation and specifically does not state how she and [the attorney] agreed that she would be notified of any BIA decision." *Id.* at B9-B10. The court concluded that petitioner's "affidavit in support of her motion to reopen

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[1] The appendix to the petition for a writ of certiorari contains an accurate reproduction of the text of the court of appeals' opinion in this case (see Pet. App. B1-B16), even though the caption (case name and Sixth Circuit docket number) as reproduced in the appendix corresponds to a different case.

based upon ineffective assistance of counsel falls short of the procedural *Lozada* requirements for failure to adequately describe the agreement she entered into with her attorney." *Id.* at B10.

The court of appeals also held, as an independent ground for its conclusion that petitioner was not entitled to reopening, that petitioner had failed to demonstrate prejudice resulting from the alleged ineffective assistance of her former attorney. Pet. App. B11-B15. The court explained that "[a] demonstration of prejudice requires that the petitioner establish that but for her attorney's actions, she would have been able to remain in the United States." *Id.* at B11. The court of appeals concluded that petitioner had "present[ed] no compelling evidence suggesting that the IJ's decision would have been overturned on appeal to [the Sixth Circuit] under a substantial evidence review and that she would have been entitled to remain in the United States." *Id.* at B13. The court explained that, even if the spousal abuse to which petitioner had previously been subjected were properly regarded as a form of persecution, petitioner could not demonstrate a "well-founded fear of future persecution" because she had "divorced her husband * * * and thus would not be subject to his abuse were she to return to her native country." *Id.* at B14.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Under established BIA precedent, "equitable tolling of deadlines and numerical limitations on motions to reopen may apply when an alien is prevented from filing

because of ineffective assistance of counsel." Pet. App. C2. The Board has made clear, however, that a motion alleging ineffective assistance of counsel must be supported by an affidavit "attesting to the relevant facts," including a detailed description of "the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to" the movant. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (1988).[2] The courts of appeals have uniformly sustained that requirement as reasonable and have held that an alien's failure to comply with it may justify a denial of reopening. See *Wang* v. *Ashcroft*, 367 F.3d 25, 27 (1st Cir. 2004); *Jian Yun Zheng* v. *United States Dep't of Justice*, 409 F.3d 43, 46-47 (2d Cir. 2005); *Xu Yong Lu* v. *Ashcroft*, 259 F.3d 127, 134 (3d Cir. 2001); *Barry* v. *Gonzales*, 445 F.3d 741, 745-746 (4th Cir. 2006); *Lara* v. *Trominski*, 216 F.3d 487, 496-498 (5th Cir. 2000); *Hamid* v. *Ashcroft*, 336 F.3d 465, 468-469 (6th Cir. 2003); *Stroe* v. *INS*, 256 F.3d 498, 501 (7th Cir. 2001); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499 (8th Cir. 2005); *Reyes* v. *Ashcroft*, 358 F.3d 592, 597-598 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1362-1363 (10th Cir. 2004); *Gbaya* v. *United States Attorney Gen.*, 342 F.3d 1219, 1221-1223 (11th Cir. 2003).

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[2] The BIA also requires that, "before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond." *Lozada*, 19 I. & N. Dec. at 639. In addition, "if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Ibid.* See Pet. App. B8, C2-C3. The court of appeals found that petitioner had complied with those requirements. See *id.* at B8-B9.

In the instant case, the BIA found that petitioner had "failed to comply with the *Lozada* requirements" because her "affidavit merely recount[ed] what her counsel failed to do, but d[id] not mention what actions her counsel promised to undertake." Pet. App. C4. The court of appeals sustained that determination, concluding that "[t]he BIA did not abuse its discretion in concluding that [petitioner] did not comply with the *Lozada* requirements." *Id.* at B11. That holding is correct. In any event, the question whether the BIA reasonably applied its own procedural regime to the facts of a particular case does not warrant this Court's review.

Petitioner contends (Pet. 10-13) that, in the absence of a written agreement between petitioner and her former counsel detailing the responsibilities that the attorney agreed to undertake, the adequacy of counsel's performance should be assessed by reference to the Michigan Rules of Professional Conduct. But even assuming, arguendo, that petitioner's former attorney failed to comply with professional norms, it does not follow that the BIA was required to reopen the administrative proceedings after the time for filing a motion to reopen had passed. As a matter of administrative discretion, the BIA under certain circumstances treats ineffective assistance of counsel as a ground for tolling the applicable deadline. The availability of tolling, however, depends on the movant's compliance with substantive and procedural requirements set forth in prior Board decisions.

As the BIA has explained, compliance with those requirements "is necessary if [the Board is] to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such [a] claim." *Lozada*, 19

I. & N. Dec. at 639. Petitioner suggests (Pet. 11) that a description of her agreement with former counsel was unnecessary in order for the Board to evaluate her own claim of ineffective assistance. In its pleading requirements for claims of ineffective assistance, however, the BIA has reasonably sought to elicit information concerning, inter alia, whether counsel has breached any express agreement as to the nature of the representation to be provided. Because petitioner failed to comply with one of those requirements, the Board permissibly declined to reopen the administrative proceedings on the basis of petitioner's untimely motion.

2. Petitioner contends (Pet. 13-16) that the alleged ineffectiveness of her former counsel violated her rights under the Due Process Clause. That claim lacks merit.

The ineffectiveness of a litigant's attorney cannot be the basis of a constitutional claim unless the litigant has a constitutional right to appointed counsel. See *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991) (holding that, because "[t]here is no constitutional right to an attorney in state post-conviction proceedings * * * , a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (per curiam) ("Since respondent had no constitutional right to counsel [in a discretionary state appeal], he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."). Petitioner appears to acknowledge that no right to appointed counsel exists in the context of removal proceedings. Pet. 14; see 8 U.S.C. 1229a(b)(4)(A) (providing that an alien in removal proceedings "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice

in such proceedings"). Thus, while the BIA may choose to treat ineffective assistance of counsel as a ground for reopening prior administrative decisions under specified circumstances, that practice is not mandated by the Constitution. The Sixth Circuit in this case and other courts of appeals have concluded that there is a due process right to effective assistance of counsel in removal proceedings, see note 4, *infra*; Pet. 14, but that conclusion is incorrect.[3]

The Court in *Torna* explained that the litigant in that case

> was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation—even if implicating a due process interest—was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive [the litigant] of due process of law.

455 U.S. at 588 n.4; see *Coleman*, 501 U.S. at 753 (in a context where a litigant has no constitutional right to appointed counsel, "the attorney is the [litigant's] agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error") (internal quotation marks omitted). The same analysis applies here. Absent any constitutional obligation on the part of the federal government to furnish petitioner with appointed counsel during her removal proceedings, any deficiency in her retained counsel's

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[3] The BIA, consistent with its usual practice of following circuit precedent, declined to find no due process right to effective assistance of counsel in *In re Assaad*, 23 I. & N. Dec. 553, 557-560 (2003).

performance cannot be attributed to the government for Fifth Amendment purposes. And, as in *Torna*, the BIA could not be said to have deprived petitioner of her rights under the Due Process Clause by denying her motion to reopen on the ground that it was untimely filed. Rather, an alien in removal proceedings generally "must bear the risk of attorney error" (*Coleman*, 501 U.S. at 753) (internal quotation marks omitted), subject to such exceptions as Congress and the BIA choose to adopt in order to protect aliens from the consequences of substandard performance by counsel in particularly egregious circumstances.

A departure from the principles announced in *Torna* and *Coleman* would be especially unwarranted in the immigration setting. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Congress has vested the Attorney General with broad discretion to establish procedures for the consideration of asylum applications, while providing aliens with the opportunity to retain counsel of their choice. See 8 U.S.C. 1158(d)(1) and (d)(4), 1229a(b)(4)(A). The BIA has treated ineffective assistance of counsel as a ground for reopening in certain circumstances but has established substantive and procedural requirements for aliens seeking to raise ineffective-assistance claims. In light of the deference this Court has consistently shown to decisions of the political Branches regarding the admission and removal of aliens, petitioner's claim of a constitutional right to reopening of the BIA decision, based on the alleged inef-

fectiveness of retained counsel in her removal proceedings, is especially misconceived.[4]

3. In any event, petitioner has not made out a claim to relief based on ineffective assistance of counsel. Petitioner contends (Pet. 16-25) that she was prejudiced by her former counsel's performance. The court of appeals stated that the determination as to prejudice turns on whether, "but for counsel's error, petitioner would have been entitled to continue residing in the United States." Pet. App. B8 (quoting *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001) (brackets omitted)). The question whether prejudice was established on the facts of this case does not warrant this Court's review, particularly because both the BIA and the court of appeals treated the absence of prejudice as simply an alternative ground for denying relief. See Pet. App. B11, C4. In any event, petitioner's argument lacks merit.

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[4] The court of appeals concluded that, because "Fifth Amendment guarantees of due process extend to aliens in deportation proceedings," petitioner had a Fifth Amendment right to the effective assistance of counsel. Pet. App. B7 n.2 (quoting *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699 (6th Cir. 2001)). That reasoning is unsound. In order to establish a violation of the Due Process Clause, a litigant must show that "the party charged with the deprivation [is] * * * a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The "state action" requirement "avoids imposing on the [government], its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936. Where, as in the context of removal proceedings, the United States is under no constitutional obligation to provide appointed counsel, any errors committed by retained counsel are not fairly attributable to the government. See *Torna*, 455 U.S. at 588 n.4 (explaining that the loss of Torna's right to seek Florida Supreme Court review "was caused by his counsel, and not by the State"). Thus, while arbitrary conduct by an IJ or other federal adjudicative official might under some circumstances effect a violation of the Due Process Clause, substandard performance by petitioner's retained attorney cannot.

a. Petitioner suggests (Pet. 16-20) that her former counsel's failure to inform her promptly of the BIA's decision deprived her of the opportunity for judicial review of the merits of her asylum claim. In finding that petitioner had not been prejudiced by counsel's alleged ineffective assistance, however, the court of appeals discussed her claim at some length. Pet. App. B13-B15. The court concluded that petitioner had "present[ed] no compelling evidence suggesting that the IJ's decision would have been overturned on appeal to [the Sixth Circuit] under a substantial evidence review." *Id.* at B13. There is consequently no basis for petitioner's assertion (Pet. 20) that the court of appeals disregarded the merits of her claim in denying her petition for review.

b. Petitioner contends that, as a result of her former attorney's ineffective assistance, petitioner "lost the opportunity to establish that she is a bona fide refugee." Pet. 20 (capitalization omitted); see Pet. 20-22. In support of that contention, petitioner alleges that the IJ committed various errors in her conduct of the removal hearing. But while petitioner's motion to reopen asserted in passing (and without any supporting detail) that her former attorney "did not help [petitioner] identify or obtain corroborating evidence" and "did not meet with her prior to her interview with the [INS's] Chicago Asylum Office," see Mot. to Reopen 3, petitioner's claim of ineffective assistance was premised *solely* on counsel's asserted failure to provide her with timely notice of the BIA decision, see *id.* at 12-13. Because any errors committed by the IJ could not have been caused by counsel's subsequent failure to inform petitioner of the Board's decision, they provide no basis for concluding that petitioner was prejudiced by the asserted ineffective assistance.

c. Petitioner contends (Pet. 22-24) that she was deprived of an opportunity to pursue a "humanitarian asylum claim" based on an amendment to the asylum regulations that became effective January 5, 2001, during the pendency of her appeal to the Board. Here again, petitioner cannot establish any causal connection between her failure to pursue such a claim and her attorney's failure to provide her with timely notice when the Board issued its decision in July 2002. At any time during the pendency of her administrative appeal, petitioner could have filed a motion to remand or reopen her case for consideration of a claim based on the January 2001 regulatory amendments. See 8 C.F.R. 3.2(c)(4) (2001).

d. Petitioner contends (Pet. 24-25) that, because she did not receive timely notice of the BIA's July 2002 decision, she unknowingly accrued extended unlawful presence in this country that may subject her to adverse consequences in the future. The BIA considered that contention and correctly found that petitioner's claims of future harm were too speculative to constitute prejudice under the governing standard. See Pet. App. C4-C5. That fact-specific determination raises no issue of broad importance warranting this Court's review.

4. Petitioner contends (Pet. 25-27) that the court of appeals' decision in this case conflicts with the decisions of the Ninth Circuit in *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042 (2000), and *Singh* v. *Ashcroft*, 367 F.3d 1182 (2004). The alleged circuit conflict does not warrant the Court's review, particularly in the circumstances of this case. Although the Ninth Circuit held in *Dearinger* and *Singh* that an attorney's deficient performance in connection with removal proceedings can under some circumstances create a presumption of prejudice, the court has not treated that presumption as

irrebuttable. The same facts that led the Sixth Circuit to conclude that petitioner had failed to establish prejudice might have persuaded the Ninth Circuit that its presumption of prejudice had been overcome.

In the instant case, moreover, the Sixth Circuit's holding that petitioner had not established prejudice was one of two *independent* grounds for the court's denial of relief. The Sixth Circuit's decision rested in addition on petitioner's failure to provide the BIA a detailed description of her agreement with her former attorney, as required by the Board in *Lozada*. Because neither *Dearinger* nor *Singh* calls into question the BIA's authority to deny reopening based on the movant's noncompliance with the *Lozada* requirements, there is no reason to suppose that the BIA's decision not to reopen the administrative proceedings would have been overturned if this case had arisen in the Ninth Circuit. The existence of that alternative ground for the Sixth Circuit's decision would make this case an unsuitable vehicle for clarification of the circumstances under which an attorney's deficient performance should be deemed to have prejudiced his client.

a. In *Dearinger*, an alien's attorney filed a petition for review of the BIA's decision one day after the deadline for filing had expired, and the petition for review was dismissed as untimely. 232 F.3d at 1044. The alien's next friends subsequently filed a petition for habeas corpus, and the district court directed the government to reenter the BIA's order so that the alien could file a timely petition for review. *Ibid.* The Ninth Circuit affirmed the grant of habeas corpus relief, holding that counsel's ineffective assistance constituted a due process violation and that prejudice should be presumed. See *id.* at 1045-1046.

The Ninth Circuit held that prejudice from counsel's ineffective assistance "should be presumed," *Dearinger* 232 F.3d at 1045, but it did not address the circumstances under which that presumption might be rebutted, and it noted elsewhere in its opinion that the alien in such a case must show "plausible grounds for relief," *id.* at 1046. In the instant case, the Sixth Circuit examined the merits of petitioner's underlying claim, concluded that the IJ's decision would not likely have been overturned if petitioner had filed a timely petition for review, and held on that basis that petitioner had failed to demonstrate prejudice from counsel's error. Pet. App. B11-B15. If this case had arisen within the Ninth Circuit, nothing in *Dearinger* would have foreclosed the court from concluding, based on the same facts, that the presumption of prejudice had been overcome.

Unlike petitioner, moreover, the alien in *Dearinger* did not file a motion to reopen in the BIA, but instead sought habeas corpus relief in federal district court.[5] The Ninth Circuit therefore was not reviewing a BIA

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[5] The specific holding of *Dearinger*--*i.e.*, that the district court in that case acted properly in granting a writ of habeas corpus that directed the government to reissue the BIA's prior decision—has been superseded by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302. Under the REAL ID Act, the district courts lack habeas jurisdiction to review any question of fact or law regarding any action taken or proceeding brought to remove an alien. The Act added a new 8 U.S.C. 1252(a)(5), and amended 8 U.S.C. 1252(b)(9), to make clear that judicial review of all challenges to a removal order must proceed (if at all) in the courts of appeals. See REAL ID Act § 106(a)(1) and (2), 119 Stat. 310-311. Thus, the question addressed in *Dearinger*, which concerned the circumstances under which a federal district court may direct the BIA to reopen a prior administrative proceeding even though no reopening request has been presented to the Board, is unlikely to arise in any future case.

determination as to the propriety of reopening. The court of appeals in *Dearinger* did not discuss *Lozada*, and it did not question the Board's authority to establish reasonable substantive and procedural requirements governing motions to reopen based on allegations of ineffective assistance.[6]

b. In *Singh*, an alien's appeal from the IJ's denial of his asylum application was dismissed by the BIA on the ground that the alien had failed to submit a brief until nearly 20 months after the filing deadline. 367 F.3d at 1184. The alien subsequently filed an untimely motion to reopen premised on the allegation that his prior counsel had rendered ineffective assistance. *Id.* at 1185. The Ninth Circuit held that the alien had been prejudiced by his former attorney's failure to file a brief in the BIA. *Id.* at 1189. While acknowledging that "[t]he presumption of prejudice resulting from counsel's failure to file a brief may be rebutted," the court held that "[t]he presumption * * * is not rebutted if an alien is able to

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[6] The Ninth Circuit has recognized that "the *Lozada* requirements are generally reasonable, and under ordinary circumstances the BIA does not abuse its discretion when it denies a motion to remand or reopen based on alleged ineffective assistance of counsel where the petitioner fails to meet the requirements of *Lozada*." *Castillo-Perez* v. *INS*, 212 F.3d 518, 525 (2000). The Ninth Circuit has further held that the BIA may be required to grant reopening, notwithstanding the movant's non-compliance with the *Lozada* requirements, if the facts establishing ineffective assistance "are plain on the face of the administrative record." *Ibid.* (quoting *Escobar-Grijalva* v. *INS*, 206 F.3d 1331, 1335, amended, 213 F.3d 1221 (9th Cir. 2000)). In the instant case, however, petitioner's claim that her former counsel had breached a duty to inform her of the BIA decision was not based on anything in the administrative record of the prior agency proceedings, but was premised solely on extrinsic evidence.

show plausible grounds for relief." *Ibid.* (internal quotation marks omitted).

In the instant case, the Sixth Circuit concluded that petitioner had "present[ed] no compelling evidence suggesting that the IJ's decision would have been overturned on appeal * * * under a substantial evidence review." Pet. App. B13. The court explained that, even if the spousal abuse that petitioner had previously suffered were properly characterized as "persecution" within the meaning of 8 U.S.C. 1101(a)(42)(A), petitioner could not establish a well-founded fear of similar *future* mistreatment in light of her divorce from her husband. Pet. App. B14. The Ninth Circuit might conclude, based on that deficiency in petitioner's proof, that petitioner could not establish "plausible grounds for relief" (*Singh*, 367 F.3d at 1189), and that the presumption of prejudice was therefore rebutted on the facts of this case.

In addition, although the BIA in *Singh* refused to toll the time for filing the motion to reopen, see 367 F.3d at 1185, the government in that case did "not dispute that Singh ha[d] complied with the procedural requirements outlined in *Matter of Lozada*," *id.* at 1185 n.1. In holding that "the BIA abused its discretion in refusing to toll the filing deadline," the Ninth Circuit explained that "[a]s soon as Singh learned that his appeal had been denied, he acted with due diligence in learning of [former counsel's] deceit, in retaining new counsel, *and in complying with the* Lozada *requirements*." *Id.* at 1186 (emphasis added). In the instant case, by contrast, the BIA and the court of appeals both held that petitioner had *not* complied with *Lozada*'s requirement that an alien alleging ineffective assistance must describe "in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal

and what counsel did or did not represent to the [alien] in this regard." 19 I. & N. Dec. at 639. Petitioner's non-compliance with the *Lozada* requirements furnished an independent ground for the BIA's denial of reopening here, and the court in *Singh* did not question the Board's authority to apply those requirements when a motion to reopen is based on allegations of ineffective assistance of counsel. The decision in *Singh* therefore provides no reason to conclude that petitioner would have obtained relief if this case had arisen in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
BRYAN S. BEIER
Attorneys

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